UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	5:13-cv-01316-SVW-OP	Date	October 24, 2017
Title	*Julie Fagan et al v. Neutrogena Corporation*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE
Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING CLASS CERTIFICATION [184]

I. Factual and Procedural Background

This action concerns four Neutrogena® pure & free® brand sunscreen products (collectively, the "Products"): Baby Sunscreen Stick, Broad Spectrum SPF 60+ ("Stick"); Baby Sunscreen, Broad Spectrum SPF 60+ ("Lotion"); Baby Faces Ultra Gentle Cream Sunscreen, Broad Spectrum SPF 45+ ("Ultra"); and Liquid Sunscreen, Broad Spectrum SPF 50 ("Liquid"). Plaintiffs allege that the phrases on the labels of the Products, "naturally sourced sunscreen ingredients," "100% naturally sourced sunscreen ingredients," and "100% naturally sourced sunscreens" (the "Challenged Claims") communicate that each of the Products is comprised entirely of natural ingredients, as opposed to just the active ingredients that protect the user from the sun's rays.

The initial class certification filing consisted of the Notice of Motion, Motion and Memorandum of Points and Authorities [ECF 52], the Declaration of Elizabeth Howlett [ECF 47], the Declaration of Nicole A. Veno (the "Veno Decl.") and Exhibits attached thereto [ECF 55]. Defendant filed papers in opposition to the Motion for Class Certification on February 21, 2014 [ECF 60]. Plaintiffs filed a reply brief [ECF 84] on March 24, 2014, together with supporting documents consisting of a Declaration of counsel and exhibits thereto. ECF 76-1, 76-3 – 76-9, and 83. Defendants filed a sur-reply on May 15, 2014. ECF 103. The Court held a hearing on the Motion on June 2, 2014, after which the Court deferred

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ruling on the Motion for Class Certification and granted Plaintiffs 60 days to submit a preliminary damages model demonstrating the possibility of calculating class-wide damages for a single state. ECF 114. Plaintiff filed the requested papers on August 4, 2014, which consisted of a Supplemental Memorandum [ECF 122] and a Supplemental Declaration by Plaintiffs' Expert Colin B. Weir ("Weir Supp. Decl."). ECF 123. A correction to Weir's Declaration was filed August 19, 2014. [ECF 128.] Defendant responded to Plaintiffs' supplemental filings on September 4, 2014, consisting of a response [ECF 135], a declaration of counsel and attachments [ECF 134], and a supplemental reply declaration by Defendant's expert, Keith Ugone. [ECF 137.] Plaintiffs filed rebuttal papers on September 9, 2014, consisting of a Reply Memorandum, and a Rebuttal Declaration. ECF 132. In addition to these materials, Defendants also filed a Motion to Exclude the Expert Testimony of Dr. Elizabeth Howlett [ECF 89] together with a supporting declaration [ECF 89-1], to which Plaintiffs filed Memorandum of Points and Authorities in Opposition [ECF 98], together with a declaration of counsel and attachments [ECF 98-1 – 98-4], leading Defendant to file a reply [ECF 106]. The parties also submitted several notices of supplemental authorities and responses thereto. [ECF 85, 86, 104, 141-157]. Further, Plaintiffs submitted the complete transcript of the deposition of their expert, Colin Weir. [ECF 101.]

In 2016, this Court stayed the case, pending the resolution of several "natural" product claims in the Ninth Circuit [ECF 166]. The stay was lifted on June 30, 2017. [ECF 174]. Before the Court now is Plaintiffs' renewed motion for class certification.

II. Legal Standard

The trial court has "broad discretion" in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001). The class may only be certified if the trial court determines, after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied. *Zinser*, 253 F.3d at 1186. In order to make this determination, the Court must also examine any issues that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

"A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("*Dukes*") (denying class certification where plaintiffs failed to satisfy all requirements of Rule 23(a)). "Plaintiffs bear the burden of showing they meet each of the four requirements of Federal Rule of Civil Procedure 23(a), together with at least one of the

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requirements of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 27 (2013) (The plaintiff must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b).").

III. Plaintiffs Fail to Prove That Common Issues Predominate Under Rule 23(b)(3)

A. Plaintiffs Fail to Establish Reliance

Plaintiffs seek to certify a California class alleging violations of CLRA. To establish liability under the CLRA, Plaintiffs must prove that they were exposed to a materially deceptive claim, that this deception was an immediate cause of their injury, and that they incurred monetary harm because of their purchases. *In re Viocc Class Cases*, 180 Cal. App. 4th 116, 129 (Ct. App., 2009). A presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material, meaning whether a "reasonable man would attach importance to its existence in determining his choice of action in the transaction in question." *In re Tobacco II Cases*, 46 Cal.4th 298, 327 (2009).

A rebuttable inference of class-wide reliance arises only where material, "identical misrepresentations" are "made to the entire class." *Kaldenbach v. Mut. Of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 849 (Ct. App. 2009). Here, some class members saw the statement "naturally sourced sunscreen ingredients" while others saw "the additional representation that the products contained '100%' 'naturally sourced'" sunscreens, and yet others saw "100% naturally sourced sunscreen ingredients". Pl. Orig. Br. (ECF No. 52) at 1. Plaintiffs assert that the labeling is "materially identical." Pl. Ren. Mtn. 5. However, evidence demonstrates that consumers interpret these different claims to communicate different messages. *See* Sapeika Tr. 71-72, 56-57 ("the part that I focused on was the 100 percent. To me, that meant all of the ingredients").

Further, during the class period, the Products' labels changed to explicitly disclose that the "purpose" of titanium dioxide and zinc oxide is "sunscreen" (*supra* 3). Although they did not consult the back label, Fagan and Sapeika testified that had they done so, they would have understood that the "sunscreens" are the two naturally sourced active ingredients. Sapeika Tr. 92; Fagan Tr. 87-88.6 Because there is "no showing of uniform conduct likely to mislead the entire class," the presumption of reliance does not apply. *Kaldenbach*, 178 Cal. App. 4th at 848-50. "If individualized questions exist regarding how consumers interpret [a challenged claim], then whether a consumer considered the statement material" is "an individualized inquiry." *Bradach v. Pharmavite LLC*, 2016 WL 7647661, at *6 (C.D. Cal. July 6, 2016)

Plaintiffs have therefore failed, at this stage, to demonstrate reliance.

B. Plaintiffs' Damages Model is Incapable of Yielding a Relevant and Reliable Class-wide Measure of Harm

"[A]t the class-certification stage (as at trial), any model supporting a plaintiff's damages case" must "measure only those damages attributable to" the plaintiff's specific theory of liability. *Comcast*, 569 U.S. at 35 (citation omitted). "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class." *Id.*

Plaintiffs' theory of liability is that the Challenged Claims misled consumers into believing that all of the ingredients in the Products were natural, as opposed to just the ingredients that provide protection from the sun. Under *Comcast*, therefore, Weir must be able to isolate the price premium attributable to (i) the Challenged Claims (ii) that mislead consumers in that particular fashion. *Id.* Weir's hedonic regression does neither. On the second issue, Weir's model fails for largely the same reasons articulated by Judge Morrow in *In re ConAgra Foods, Inc.*, 302 F.R.D. 537 (C.D. Cal. 2014) ("*ConAgra I*").

In *In re ConAgra Foods, Inc.*, plaintiffs sought to certify classes of purchasers of cooking oils, alleging that a "100% Natural" label caused consumers to believe that the oils contained no genetically modified organisms or "GMO" ingredients. There, Weir (the same expert Plaintiffs use here) proposed a model which generically calculated the increased value attributable to the "100% Natural" label, but did not isolate the value attributable to consumers' (mistaken) understanding that it was GMO-free. *ConAgra I* at 579. The Court denied class certification, and subsequently found Weirs model lacking again, finding that "Weir again fails to provide an acceptable damages methodology that isolates and quantifies damages associated with plaintiffs' specific theory of liability . . . . As he did in support of plaintiffs' original motion for class certification, Weir focuses solely on the "price premium" attributable to the "100% Natural" label; he makes no efforts to segregate the price premium attributable to a consumer's understanding that "100% Natural" means the cooking oils contain no genetically modified organisms." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1024-25 (C.D. Cal. 2015) ("*ConAgra II*").

Here, Plaintiffs concede that Weir's hedonic regression[1] is "materially identical" to the one that was

[1] A hedonic regression is a method used to determine the value of a good or service by breaking it down into its component parts. The value of each component is then determined separately through regression analysis. *See* HEDONIC REGRESSION

twice rejected in ConAgra. ECF No. 149. As in *ConAgra*, Mr. Weir attempts only to calculate a single "market premium" for natural type claims. Weir. Supp. Tr. 17. Accordingly, a portion of a premium attributable to the Claims may be attributable to the literally truthful message conveyed by the Claims; namely, that the ingredients that provide protection from the sun are naturally sourced. It is also possible that a portion of the premium is attributable to other misunderstandings consumers had, rather than the specific misunderstanding that is Plaintiffs' theory of liability in this case. Ugone Supp. Reply Decl. ¶¶ 16-19. This was the case in ConAgra as well—the GMO misunderstanding was just one of several possible interpretations of the misrepresentation in that case. Weir's methodology is incapable of distinguishing between the value of these interpretations. *Id.*; Weir Supp. Tr. 13-14. Therefore, Weir's method improperly "identifies damages that are not the result of the wrong." *Comcast*, 569 U.S. at 38. *See In re 5-Hour Energy*, 2017 WL 2559615, at *11 (rejecting Weir's damages method that failed to account for the value of the non-misleading interpretation of an "energy" labeling claim; "even if Plaintiffs[] are correct that caloric energy [as opposed to subjective feelings of alertness] is the dominant definition of "energy," Plaintiffs must . . . isolate the specific premium paid for five hours of caloric energy"). Accordingly, Weir fails to satisfy *Comcast*.

The Court acknowledges that the District of Connecticut reached a different conclusion with regard to Mr. Weir's methods. *Langan v. Johnson & Johnson Consumer Companies, Inc.*, No. 3:13-CV-1470 (JAM), 2017 WL 985640, at *4 (D. Conn. Mar. 13, 2017). However, in both that case and Judge Morrow's rulings in *ConAgra I* and *II*, there was only one misrepresentation at issue. Thus, the possible interpretations were more limited. Here, there are multiple misrepresentations, so the model's inability to isolate the premium attributable to the theory of liability is more significant. Judge Morrow also only had one misrepresentation before her in *ConAgra*— to the extent that Judge Morrow's ruling is in tension with *Langan*, this Court finds the former to be more persuasive.

IV. Conclusion

Because of these two issues, Plaintiffs fail to meet the requirements of Rule 23[2]. Plaintiffs' motion for class certification is DENIED.

INVESTOPEDIA (2010), http://www.investopedia.com/terms/h/hedonic-regression.asp (last visited Oct 23, 2017).

[2] The Court notes that the 23(b)(3) "predominance" requirement is more stringent than the commonality requirement of 23(a). *Comcast*, 569 U.S. at 34. Plaintiffs have very likely satisfied the requirements of 23(a).

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IT IS SO ORDERED.

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